

OFFICE OF ADMINISTRATIVE LAW

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**MEMO**

Date: December 14, 2000

To: Department Directors/Executive Officers
Chief Counsels
Regulation Coordinators

From: Office of Administrative Law
555 Capitol Mall, Suite 1290
Sacramento, California 95814-4602

Re: **Changes to the Rulemaking Part of the Administrative Procedure Act ("APA") effective Jan. 1, 2001**

Assembly Bills 505 and 1822 (Statutes of 1999, chapters 1959 & 1960, respectively) take effect on January 1, 2001. (For copies of these chaptered bills, see www.leginfo.ca.gov.) This memorandum provides a list of the changes mandated by these bills.

Please note that, in order to comply with the new law, rulemaking notices received by the Office of Administrative Law ("OAL") after 5 p.m., Tuesday, December 19, 2000, must contain the new notice requirements. Notices received after December 19 will be published in the California Regulatory Notice Register after January 1, 2001.

Also, the provisions of the two bills were not fully harmonized during the legislative process. The California Law Revision Commission, sponsor of AB 1822, is working on a technical cleanup bill to be introduced next year, which would combine the two bills' electronic publication requirements and also correct an imperfect definition of "proposed action." An additional cleanup bill will likely be introduced in 2002, after agencies and other interested parties have had some experience in working with the revised APA.

The new rulemaking law does the following:

General

- (1) Provides for the use of electronic communication in the delivery and publication of notices and rulemaking documents, but states that electronic communication is not to be the exclusive means by which the documents are published or distributed.
- (2) Requires rulemaking agencies that have websites to post specified rulemaking process documents and dates (for example, the statement of reasons and the effective date of the regulation) on those websites, but failure to so post will not invalidate the action.
- (3) Shifts an existing definition of “cost impact” from a code section concerning notices of proposed action to the definitions section of the APA.
- (4) Adds a definition of “proposed action.”

Pre-notice, preliminary activities (the “workshop” phase)

- (1) Authorizes state agencies to consult with interested persons before publishing the official notice inviting public comment.
- (2) Requires the agency, in some circumstances, and subject to an exception, to conduct public discussions with parties that would be subject to a proposed regulation, prior to publication of the 45-day notice inviting public comment. Requires an agency not holding a pre-notice “workshop” to place in the administrative record a reasonably specific explanation for not conducting a workshop. Compliance with these two requirements is not subject to judicial or OAL review.

Notice of Proposed Action (or “Rulemaking Notice”)

- (1) Revises the provisions governing preliminary cost impact determinations made by state agency with respect to certain notices of proposed actions to make clear that these determinations are preliminary in nature.
- (2) Specifies that certain findings required with regard to reporting requirements for businesses be included in the notice (current law requires the findings, but fails to state where in the record they should appear).
- (3) Requires a state agency under specified circumstances to deliver notice of its decision not to proceed with a proposed action to OAL for publication in the California Regulatory Notice Register.
- (4) Requires OAL, no later than January 1, 2002, to establish a system of unique identification numbers for each state agency rulemaking action, and requires agencies to use these numbers in responding to public inquiries.

- (5) Requires OAL, no later than January 1, 2002, to put the Notice Register (the weekly state publication containing notices of proposed regulations, etc.) online, and to keep back issues posted for at least 18 months. With financial assistance from the Trade and Commerce Agency, OAL and the Office of State Publishing put the Notice Register online commencing July 2000.
- (6) Requires OAL to post on its website one or more links to assist the public in gaining access to the text of regulations proposed by other state agencies.
- (7) Requires rulemaking agencies to accept public comments submitted by fax and by e-mail.
- (8) Expands an agency's duty to describe and consider reasonable alternatives to the regulation proposed by the agency.
- (9) Requires an agency to give interested parties the option of receiving rulemaking notices related to specific programs, rather than having to receive notices concerning all programs administered by the agency.
- (10) Makes clear that the agency must mail rulemaking notices to selected small businesses or their representatives.
- (11) Requires an agency to provide in the rulemaking notice not only the name and phone number of the staff member designated as the contact person for the rulemaking proposal (as provided in existing law), but also to provide (a) the name and number of a backup contact person and (b) the name and number of a staff member who can respond to questions concerning the substance of the proposed regulation.
- (12) Recasts an existing economic impact assessment requirement to make clear that it applies to statewide impacts.
- (13) Revises an existing economic impact assessment requirement (which has proven ineffective) to require the agency (1) to describe any known cost impacts or (2) to plug in a boilerplate statement to the effect that the agency is not aware of any cost impacts on a representative private person or business subject to the proposed regulation.

Please note that the requirements of Title 1, California Code of Regulations ("CCR"), section 4(a) and (c) have not been repealed. These regulatory provisions continue to require the notice to contain (a) a determination as to whether the adoption or amendment affects small business and (b) if it is determined that the proposal does not affect small business, a brief explanation of the reason(s) for this determination. Section 4 is also

discussed below under the heading “Text of Proposed Regulation.”

Initial (and Final) Statement of Reasons

Deletes the requirement that the agency identify the “public problem” that the proposal is intended to address.

Text of Proposed Regulation

Revises provisions requiring the use of plain English with regard to regulations affecting small businesses, to apply to all regulations; revises the definition of the term “plain English” for these purposes (i.e., deletes the “8th grade proficiency” criterion in the definition of plain English, stating instead that a regulation is written in plain English if it satisfies the APA clarity standard). Subsections (b) and (d) of section 4, Title 1, CCR (an OAL regulation) are inconsistent with these legislative changes and should be disregarded; OAL plans to delete these subsections by filing a change without regulatory effect (Title 1, CCR, section 100), effective January 1, 2001. Section 4 is also discussed above in the last item under the heading “Notice of Proposed Action.”

Public Hearing

- (1) Requires oral testimony to be allowed at public hearings on proposed regulations, subject to reasonable limitations.
- (2) Indicates that an agency should consider extending the public comment period if a comment made at a public hearing raises a new issue and a member of the public requests time to respond, unless this would cause undue delay.

Final Statement of Reasons

Requires an agency to separately identify and respond to all relevant comments submitted by either (a) the Trade and Commerce Agency or (b) the OPR Small Business Advocate, and to provide a basis for rejecting those comments, if applicable.

Special Procedures

Revises the format required for State Water Resources Control Board policies, plans, and guidelines submitted to OAL for review (i.e., requires strikeout/underline).

Exemptions

- (1) Creates an exemption from the rulemaking requirements of the APA for a regulation that establishes criteria or guidelines to be used by the staff of a state agency in performing an audit, investigation, examination, or inspection, settling a commercial

dispute, negotiating a commercial arrangement, or in the defense, prosecution, or settlement of a case, subject to specified conditions.

- (2) Creates an exemption from the rulemaking requirements of the APA for a state agency rule that is the only legally tenable interpretation of a provision of law.

OAL Review

Specifies that the period for review of a proposal to make an emergency regulation permanent is 30 working days, rather than 30 calendar days.

Judicial Review

Provides for judicial review of an order of repeal of a regulation as well as adoption of a regulation, and expands the types of evidence that a court may consider as part of the review proceeding.

Publications

- (1) Permits OAL to publish summaries, rather than full text disapproval decisions, in the Notice Register.
- (2) Changes the name of the “California Regulatory Code Supplement” to the “California Code of Regulations Supplement.” (This is the weekly loose-leaf update to the California Code of Regulations.)

Small Business Advocate; Small Business Liaisons

AB 505 transfers the Small Business Advocate function from the Trade and Commerce Agency to the Governor’s Office of Planning and Research (“OPR”), expands the Advocate’s duties (by, for instance, requiring a report every two years to the Governor and the Legislature), and requires all state agencies regulating small business to designate a staff member as small business liaison. This liaison will not only directly respond to specific small business concerns, but also will work with the OPR Small Business Advocate. AB 505 also creates a Governor’s Small Business Reform Task Force, chaired by the Small Business Advocate. This Task Force is required to prepare a report to the Governor and Legislature. Inquiries about the OPR Small Business Advocate or small business liaisons should be referred to OPR, phone (916) 322-2318.

Miscellaneous clarifying and technical changes in the APA

For example: (a) restructures the definitions section of the APA, without making substantive changes and (b) conforms particular, minor provisions of the APA to

Statutes of 1987, Chapter 1375 (AB 2540), which mandated that the APA apply not only to adoptions and amendments of regulations, but also to repeals.

Strikeout/underline version of APA changes

Please note that the provisions of the rulemaking part of the APA amended by AB 505 and AB 1822 are displayed in strikeout/underline format on our website, www.oal.ca.gov.

If you have any questions or suggestions concerning these matters, please feel free to contact me at (916) 323-6221, or Herb Bolz, our Legislative Coordinator at (916) 323-6814 or hbolz@oal.ca.gov.

Sincerely,

David B. Judson
Deputy Director/Chief Counsel